IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 13, 2004 Session

IN RE: ESTATE OF ALLEN DEE COOK

Appeal from the Probate Court for Unicoi County
No. 5986 Robert G. Lincoln, Judge

No. E2004-00293-COA-R3-CV - DECEMBER 30, 2004

Following the death of Allen Dee Cook ("the testator"), his co-executors – his widow, Jo Ann P. Cook, and his son, Ronald S. Cook (collectively "the defendants") – filed the testator's will for probate in the trial court. That court admitted the will to probate. Thereafter, two of the testator's stepchildren – Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer (collectively "the plaintiffs") – filed a complaint in the trial court seeking to establish that a prior irrevocable joint will was the last will and testament of the testator. In addition, the plaintiffs alleged (1) that the previously-probated will was the product of undue influence, and (2) that the testator was not of sound mind when he executed the second will. Following removal to circuit court and a later remand, the trial court held, in summary fashion, that the plaintiffs had not filed a timely, properly-supported claim against the testator's estate. As a part of its judgment, the trial court also held (1) that the failure of the plaintiffs to produce the original of the first will gives rise to a presumption that it was revoked; (2) that the presumption of revocation had not been overcome by the requisite degree of proof; and (3) that the facts before the court precluded a grant of summary judgment to the defendants on their defense that the plaintiffs had violated the *in terrorem* provision of the testator's will when they contested its validity. The plaintiffs appeal. We affirm so much of the trial court's judgment as holds (1) that the plaintiffs failed to file a properly-supported, properly-verified claim for breach of contract not to revoke the earlier will; and (2) that there are facts in the record precluding a determination, at this stage in the proceedings, that the *in terrorem* clause should be enforced against the plaintiffs. In all other respects, we reverse the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed in Part; Reversed in Part; Case Remanded.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and GARY R. WADE, SP.J., joined.

David M. Cook and Virginia M. Patterson, Memphis, Tennessee, for the appellants, Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer.

Lois B. Shults-Davis, Erwin, Tennessee, and Anthony A. Seaton, Johnson City, Tennessee, for the appellees, Jo Ann P. Cook and Ronald S. Cook, co-executors.

OPINION

I. *Facts and Procedural History*

The testator married the plaintiffs' mother, Joy Donnelly, in 1969. At the time of their marriage, each of the parties had children from previous marriages. The testator had three children – Allen Dee Cook, Jr., Kenneth Allee Cook, and Ronald S. Cook ("the Cook children") – and his wife had four children – Ted Alan Donnelly, Sandra Donnelly Schweitzer, Susan Donnelly Crowe, and Lisa Donnelly Gelfand ("the Donnelly children"). Each of the parties also owned property when they married. The testator owned 40 acres of land in Florida. His wife owned a residence and commercial property in Erwin, a one-half interest in a farm in Jonesborough, and a one-half interest in a furniture store in Erwin. Following their marriage, the testator and Ms. Cook sold the Erwin residence and built a house on land she owned behind that property. When that house was later sold, they built and moved into a house on Galax Drive in Erwin.

Ms. Cook died on January 30, 1993. The plaintiffs contend that, prior to their mother's death, she and the testator executed a joint will providing for the disposition of their property. This will ("the 1992 will"), according to the plaintiffs' contention, was executed in Louisiana on March 17, 1992. A document, which was ultimately filed in the trial court by the plaintiffs, purports to be a copy of the 1992 will as executed. It reflects the appointment of the plaintiffs as the co-executors of that will if the surviving spouse is unable or unwilling to serve as the executor/executrix. The proffered document further provides for the following distribution of the estate upon the death of the surviving spouse: the Galax Drive property to the Donnelly children; the Florida property to the Cook children; and the proceeds of the testator's IRA account to be divided equally among the seven children.

The document purporting to be a copy of the 1992 will as executed was proffered by the plaintiffs along with copies of two executed memoranda, one signed by the testator and the other signed by Ms. Cook. Both memoranda were signed under oath. The will and the memoranda were all dated March 17, 1992.

The two memoranda, copies of which are in the record before us, are substantially identical. The one identifying Allen Dee Cook as testator provided that "[i]t is [the testator's] intention to enter into a contract and reciprocal will with [Ms. Cook]." It also provided that it was the testator's "intent that [the document would] bind both of them" to the provisions of the will. The other memorandum identified Ms. Cook as testator and contains the same language.

On May 4, 1996, the testator married Jo Ann Parsley. The testator executed a subsequent will on November 26, 1997 ("the 1997 will"). The 1997 will stated that by making the will, the testator "hereby revok[ed] all instruments of a testamentary nature heretofore made by [him]." The

will provided, in relevant part, that a life estate in the Galax Drive residence would pass to his widow, and the remainder would pass in one-eighth shares to his widow and the seven children. The Florida property was devised to his son, Kenneth Allee Cook. Other than his household goods, personal effects, art, and his 1996 automobile, all of which items were the subject of specific bequests, the remaining estate was bequeathed to his wife and the seven children in equal shares.

The testator died on December 21, 1997. The defendants, who were designated in the 1997 will as the co-executors of his estate, offered the 1997 will for probate in January, 1998. The Donnelly children were notified by letter dated January 8, 1998, that the testator had passed away and that the 1997 will would be tendered for probate. A notice to creditors was published in the newspaper in January, 1998.

On March 6, 1998, the plaintiffs responded to the letter by filing a "Complaint After Probate" in the trial court, averring that the 1997 will was not the testator's true will. Rather, they alleged, the 1992 will, executed jointly with Joy Donnelly Cook, was the true last will of the testator. In particular, the plaintiffs averred that "once that joint document [*i.e.*, the 1992 will] was duly executed before the proper witnesses it became a contract by and between the two parties thereto and, it could not be changed thereafter without the by [sic] consent of both makers." Consequently, the plaintiffs alleged that they were "under a clear fiduciary obligation to uphold the word and legal effect of this prior joint will by presenting same to the [c]ourt for consideration and by asserting that the [1997 will] now probated is, in fact, not the true and valid Last Will and Testament of [the testator]." The plaintiffs referred to the joint will in their complaint, indicating that "[a] copy of that joint Will is attached hereto and intended to be read as an integral part hereof." Despite this assertion, the record reflects that the "Complaint After Probate" was filed *without* attachments.

In the alternative, the plaintiffs alleged that the 1997 will, which had been previously admitted to probate in common form, was not the true will of the testator because the testator was of unsound mind at the time of its execution and he was unduly influenced to make the second will. In particular, they averred that shortly before executing the 1997 will, the testator "wrongfully or unknowingly" transferred his ownership in various bank accounts into the names of his new wife and the Cook children, despite his intention expressed in the 1992 will that all property would be divided equally among the Cook and the Donnelly children.

The "Complaint After Probate" asked that the 1992 will "be declared the true and valid Will and Testament of Allen Dee Cook, be certified to the Circuit Court of this County to the end that an issue be made there to try its validity and the validity of all others." The complaint was signed by the plaintiffs Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer. It contains the following acknowledgment of Ms. Gelfand before a notary public:

> Personally appeared before me, a Notary Public in and for the State and County aforesaid, Lisa Donnelly Gelfand, Petitioner in this action, personally known to me (or satisfactorily proven to be the person making oath herein), and she makes oath in due form of law

> that the facts contained in this Complaint to Contest Will After Probate, is true to the best of her knowledge, information and belief.

The complaint contains no other oaths.

In response to the plaintiffs' complaint, the defendants filed a motion to dismiss on April 1, 1998, based upon the following grounds: that the plaintiffs failed to file any proof or even a copy of the 1992 will; that the 1992 will failed to meet the requirements of Tenn. Code Ann. § 32-3-107 (2001) regarding the establishment of a contract to make a will or not to revoke a will; that the will sought to be probated was not properly drafted; that the plaintiffs had no standing to bring this action; and that the complaint failed to state a claim upon which relief can be granted.

It appears that in February, 1999, more than a year after the testator's death, the parties appeared before the trial court. At that time, the court directed the plaintiffs to file the original of the 1992 will within 30 days.

On March 16, 1999, in response to the trial court's directive to produce the 1992 will, the plaintiffs submitted a statement asserting that the original 1992 will and the original of the two memoranda of understanding, the one executed by the testator and the one executed by Joy Donnelly Cook, were "not available" to the plaintiffs. The plaintiffs further averred, however, that the existence of the will could be demonstrated by affidavits from the plaintiffs as well as the affidavit of Elizabeth Williams, the Louisiana attorney who witnessed the execution of the 1992 will.

In an affidavit filed in this cause, Elizabeth Williams stated that she informed both parties that the will could be changed "prior to death of either one of them," but that she "further informed them that after the death of either party the documents become irrevocable and could not be changed." Lisa Donnelly Gelfand stated in her affidavit that she met with the testator at some point after her mother's death. According to her, the testator showed her a document signed by the testator and her mother, which provided that the house on Galax Drive was to be left to the Donnelly children, the Florida property would be devised to his sons, and the IRA investment account would be divided equally among all seven children. Ms. Gelfand further stated that prior to the testator's marriage to Jo Ann Parsley, he assured her that nothing was going to change regarding his agreement with Ms. Gelfand's mother. Both Sandra Donnelly Schweitzer and Susan Donnelly Crowe stated by way of affidavit that following their mother's death in January, 1993, they visited the testator, at which time he produced a document for them to read. Both affiants stated that the document recited that the Galax Drive residence would pass to the Donnelly children and that the money was to be divided equally among all of the children. They stated that the document was signed by their mother and the testator. Sandra Donnelly Schweitzer stated that she "recognized [the document] as the same document that [the testator] and [her] mother signed at Attorney Elizabeth Williams' office in New Orleans in March of 1992."

While the plaintiffs furnished a copy of the 1992 will on March 16, 1999, they contend that a copy had also been affixed to the original complaint filed on March 6, 1998. As we have previously noted, the record before us does not otherwise substantiate this latter contention.

The case was subsequently removed to circuit court upon motion of the defendants. The plaintiffs later filed a complaint in circuit court to enforce a contract to make a will along with a petition for certiorari.[1] The pleadings were consolidated on December 20, 1999. In circuit court, the defendants moved for summary judgment on the grounds that the testator was, in fact, competent at the time the 1997 will was executed, and that the 1992 will contained no contract term proving that the joint will was irrevocable. In its order entered April 6, 2000, the circuit court denied summary judgment on the issue of testamentary capacity. As to whether the 1992 will contained the statutory language required by Tenn. Code Ann. § 32-3-107(a)(3)[2] to make a will irrevocable, the circuit court initially found that the will did not contain the required statutory language. However, the court subsequently reversed its decision on this issue, citing lack of jurisdiction to adjudicate the breach of contract claim.

On remand of the breach of contract claim to the trial court, that court was called upon to rule upon the issue of whether the parties had entered into a contract to make an irrevocable joint will. Following the receipt of oral argument on February 23, 2002, the trial court entered an order on April 24, 2002, denying the defendants' motion for summary judgment as to "the assertion that no contract term existed providing that the alleged will was 'irrevocable'."[3] It did so because it found that the copy of the 1992 will evidenced the testator's intent to enter into a contract and reciprocal will with Joy Donnelly Cook. The trial court reserved ruling, however, on the following issues: whether enforcement of the contract was procedurally improper given the fact that no claim was filed against

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[1]We do not have before us the "technical record" from the circuit court; rather, the record before us is limited to those pleadings and orders filed in the probate court. Consequently, our review is limited to the record from the trial court.

[2]Tenn. Code Ann. § 32-3-107 provides as follows:

> (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate can be established only by:
>
> (1) Provisions of a will stating material provisions of the contract;
> (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
> (3) A writing signed by the decedent evidencing the contract.
>
> (b) The execution of a joint will or mutual wills does not create a presumption of a contract to make a will, or to refrain from revoking a will.

[3]The court stated that although the contract in question did not specifically employ the word "irrevocable," it did utilize the word "bind," the meaning of which was deemed by the trial court to be a question of fact precluding summary judgment.

the estate; whether lack of an original will raised a presumption that one or both testators revoked the will; and whether the *in terrorem* clause contained in the 1997 will necessitated a holding that the plaintiffs had forfeited their legacies by filing this action.

The trial court addressed the issues that remained in an order entered on November 21, 2003. In that order, it decreed as follows:

> Plaintiffs' claim of irrevocability of the [1992 will] is *denied*, no proper claim having been filed in probate.
>
> [The 1992 will] is hereby *revoked* by the absence of an original and the execution by [the testator] of the subsequent November 26, 1997 will.
>
> The *in terrorem* clause does not apply to the facts presented before this Court at the present time.

(Paragraph numbering omitted; emphasis in original). It is from this order that the plaintiffs appeal.

II. *Standard of Review*

The trial court did not hear the testimony of any "live" witnesses. The facts before the lower court, and now before us, come from the pleadings, affidavits, and other material filed as a part of the record below. While the trial court's discussion of the facts and its analysis and conclusions are not couched in summary judgment phraseology, it is clear to us that the trial court approached this case as one to be analyzed under the rubric of summary judgment. Hence, our approach is the same.

One of the grounds of the defendants' motion to dismiss is predicated upon the alleged failure of the plaintiffs to file a properly-supported claim. However, in addressing this issue, the trial court looked at the entire record, including material outside the pleadings. This being the case, we evaluate the propriety of the trial court's judgment on this issue under the principles of summary judgment. *See* Tenn. R. Civ. P. 12.03.

In deciding whether a grant of summary judgment is appropriate, courts are to determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Courts "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993) (citations omitted). The party seeking summary judgment has the initial burden of demonstrating that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. ***Id.*** at 215.

Summary judgment should be granted "when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion." ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995) (citation omitted). "[S]ummary judgment proceedings are not in any sense to be viewed as a substitute for a trial of disputed factual issues." ***Evco Corp. v. Ross***, 528 S.W.2d 20, 25 (Tenn. 1975). Since a motion for summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court's judgment. ***Gonzales v. Alman Constr. Co.***, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993).

III. *Parties' Contentions*

The plaintiffs contend that the trial court erred (1) when it found that they failed to properly file their claim against the testator's estate, and (2) when it found that the 1992 will was presumptively revoked. The defendants counter that the trial court correctly held that the plaintiffs failed to properly file a claim of irrevocability; they agree with the trial court's holding that the 1992 will is presumed to be revoked. In addition, the defendants contend that the trial court erred with respect to its holding that the *in terrorem* clause contained in the 1997 will was not implicated by the facts of this case. According to the defendants, the plaintiffs forfeited their legacies under the 1997 will by filing their complaints against the estate.

IV. *Plaintiffs' Claim Against Estate*

The first issue raised by the plaintiffs concerns the trial court's reliance on our decision in ***Rogers v. Russell***, 733 S.W.2d 79 (Tenn. Ct. App. 1986). The trial court relied on that case to support its holding that the plaintiffs failed to properly bring a claim against the estate seeking to enforce the contract not to revoke the 1992 joint will. In ***Rogers***, this court addressed the manner by which one may assert an allegation that a will executed prior to the one admitted to probate was irrevocable. ***Id.*** at 83. We held that a will contest case is not the proper proceeding within which to assert the irrevocability of a prior will. ***Id.*** In so holding, we noted the "difference between the testamentary and contractual aspects of a joint will." ***Id.*** We further held that a party seeking to raise the contract issue must proceed by filing a *claim against the decedent's estate,* averring that the decedent breached a contract by executing a subsequent will. ***Id.*** at 85.

The plaintiffs seem to argue that ***Rogers*** provides for two different "vehicles" for pursuing a complaint for breach of contract not to revoke a joint will. In support of this proposition, the plaintiffs cite language from ***Rogers***, which language comes from a treatise:

> Frequently joint or mutual wills are made in pursuance of an agreement or compact not to revoke them. Here it is important to distinguish between the concept of wills and that of contracts. Our law has no separate concept of "will made in pursuance of contract;" we must treat the will part as a will and the contract part as a contract.

> Viewed in the aspect of a will, such instruments do not differ from other wills. In order to be effective, they must be admitted to probate and they are revocable although there has been an agreement not to revoke. The matter of the contractual aspect does not properly arise upon probate, but only when the agreement is sought to be established as a claim against the estate, *or in a proceeding against the successors of the decedent*.

Id. at 84 (quoting T. Atkinson, ***Handbook on the Law of Wills*** § 49, at 224 (2d ed. 1953)) (emphasis added). By relying upon the above-cited language, particularly the clause providing that a claim to enforce a contract may be "established as a claim against the estate, *or* in a proceeding against the successors of the decedent," ***id.*** (emphasis added), it appears that the plaintiffs understand ***Rogers*** to stand for the proposition that such a claim can be made by filing a separate lawsuit against the personal representatives of the deceased rather than by filing a claim in probate against the estate.

Rogers does seem to suggest some type of alternative way to pursue the subject claim. Yet, even assuming this is true, we are dealing in the instant case with a claim that was filed in probate court, and there is certainly nothing in ***Rogers*** to suggest that a claimant can pursue different remedies for the same cause of action in different forums at the same time. The plaintiffs pursued their claim to enforce the contract not to revoke the 1992 will in probate court, and, under ***Rogers***, that court had jurisdiction to dispose of that claim. The only other proceeding filed by the plaintiffs was the complaint in circuit court in connection with their *will contest*, a proceeding that is still pending there. It was subsequently determined by the circuit court that it lacked jurisdiction to try the breach of contract claim. As previously noted, the circuit court remanded the case to the trial court for the purpose of deciding the breach of contract claim.

We believe that ***Rogers*** stands for the proposition that a claim for breach of contract not to revoke a will, *however it is styled*, must be filed in probate court, must be timely filed, and must satisfy the procedural requirements of Tenn. Code Ann. § 30-2-307 (2001). Since the plaintiffs filed a claim in the trial court, we hold that it was properly addressed by that court.

We now turn to the issue of whether the claim in probate was timely and whether it was filed in compliance with the statutory requirements.

In order to bring a claim against an estate, a party must file within the statutory period. Depending upon the circumstances, this period is either four months from the first publication of notice, *see* Tenn. Code Ann. § 30-2-306(c) (2001), or a year from the decedent's death, *see* Tenn. Code Ann. § 30-2-307(a)(1). It is incumbent upon the estate's personal representatives to furnish notice of the statutory period to all creditors of whom the representative has "actual knowledge or who are reasonably ascertainable." Tenn. Code Ann. § 30-2-306(e). This notice "must, at a minimum, include information regarding the commencement of probate proceedings and the time period within which claims must be filed with the probate court." ***Estate of Jenkins v. Guyton***, 912 S.W.2d 134, 138 (Tenn. 1995).

The plaintiffs first argue that, contrary to the trial court's finding, their claim was timely filed because the defendants failed to furnish proper notice. In particular, the plaintiffs contend that the letter[4] sent on January 8, 1998, informing them of the testator's death did not indicate the time period within which claims must be filed. The defendants counter that they notified the plaintiffs as *beneficiaries* under the 1997 will and not as *creditors* because they were unaware of the alleged contract, *i.e.*, the 1992 will, upon which the plaintiffs rely to support their claim for breach of contract. Consequently, according to the defendants, the plaintiffs were not "reasonably ascertainable" creditors and thus not entitled to the notice due a creditor.

In ***Guyton***, the Supreme Court held that a letter furnished to a creditor that failed to contain information as to the time for filing a claim failed to satisfy the notice requirement set forth in Tenn. Code Ann. § 30-2-306. ***Id.*** As a consequence of this failure, the creditor was granted one year from the date of the testator's death within which to file its claim. ***Id.*** at 137. Similarly, in the instant case, the January 8, 1998, letter to the plaintiffs was not sufficient because of its failure to provide the time frame for filing claims. However, the language of the notice is only material if the plaintiffs are entitled to the statute's protection as a known or "reasonably ascertainable" *creditor*.

We do not need to reach the issue of whether the plaintiffs were known to the defendants as creditors or were "reasonably ascertainable" as creditors. The trial court found that notice was timely and sufficient. Even if we were to disagree with the trial court on this issue, this would not affect our decision in this case. As discussed herein, even if the plaintiffs were entitled to the period of one year from the date of the testator's death within which to file their claim, they failed to file a properly-supported claim in this case.

The plaintiffs argue that they timely filed their action to enforce the contract not to revoke by filing a complaint in the trial court on March 6, 1998, within three months of the testator's death. They contend that they complied with the Tenn. Code Ann. § 30-2-307(b) requirement – that a claim involving a written instrument be filed with the writing affixed thereto along with a sworn affidavit stating that the claim is "a correct, just and valid obligation of the estate of the decedent" – by filing a verified complaint with a copy of the 1992 will attached to the complaint. As we have previously

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[4]The letter reads, in relevant part, as follows:

> This letter is written to advise you that administration of the Estate of Allen Dee Cook, lately deceased, has been undertaken by this office through the Probate Court for Unicoi County, Tennessee, with the due probate and entry of his will for administration.
>
> A copy of the Last Will and Testament is being providing [sic] to you as a beneficiary of the estate.
>
> This office, through the [defendants' attorney], will be handling all administration matters. If you have any questions or comments with regard to the administration of the estate or any disposition of property, please direct your inquiries regarding same to the [defendants' attorney]. . . .

noted, the "Complaint After Probate" in the record before us does *not* have a copy of the 1992 will affixed to it. The copy of that will does not appear in the record until March 16, 1999 – almost 15 months after the testator's death – when the plaintiffs, in response to a February, 1999, court order to produce the original of the 1992 will, filed a statement averring that neither the original will nor the originals of the memoranda of understanding were available. At that time, the plaintiffs submitted a document which purports to be a copy of the 1992 will as executed, along with affidavits from the Donnelly children and the attorney who drafted the 1992 will.

The trial court found that "no copy of the alleged will was attached as pled in the Complaint." Subsequently, the trial court found the claim was procedurally improper, stating that

> [n]o proper claim having been filed in this Court against the estate of [the testator] leaves Plaintiffs without remedy. The timeframe [sic] for filing any claims against the [testator's] estate has passed. The only submission to this Court has been the filing of affidavits and motion filed March 16, 1999 stating the original wills executed by [the testator] and Joy Cook in Louisiana are not available, without any demand being made against the estate. Therefore, this Court finds that enforcement of a Contract Not to Revoke is procedurally improper due to no claim being timely filed against the estate.

The plaintiffs contend that the trial court's interpretation of the record is erroneous. They strenuously argue that a copy of the 1992 will was affixed to their complaint filed on March 6, 1998. In support of this argument, they contend: (1) that the inclusion of the 1992 will is evidenced by the language contained in the complaint which reads that "[a] copy of that joint Will is attached hereto and intended to be read as an integral part hereof"; (2) that over the seven-year course of this litigation, the copy of the will must have been removed or lost from the probate court file; and (3) that the existence of the 1992 will is evidenced by pleadings in the technical record. They point to the defendants' motion to dismiss, in which the defendants contended that the 1992 will fails to satisfy the requirements of Tenn. Code Ann. § 32-3-107 regarding the establishment of a contract to make a will or to create a presumption of contract to refrain from making a will, and that the will was not properly drafted. Therefore, so the argument goes, the defendants must have had a copy of the will when they made this defense. The defendants' motion, however, specifically stated that the plaintiffs have not filed an "original or even a copy of the will."

Tenn. Code Ann. § 30-2-307(b) provides as follows:

> When any claim is evidenced by a written instrument, such instrument or a photocopy of such instrument shall be filed; . . . ; and every claim shall be verified by affidavit of the creditor before an officer authorized to administer oaths, which affidavit shall state that the claim is a correct, just and valid obligation of the estate of the decedent, that neither the claimant nor any other person on the

> claimant's behalf has received payment thereof, in whole or in part, except such as is credited thereon, and that no security therefore has been received, except as thereon stated.

We hold that the plaintiffs' "Complaint After Probate" can be fairly construed, at least in part, as a claim against the estate for breach of contract based upon the theory that the testator entered into an irrevocable joint will with Ms. Cook and thereafter, in violation of his agreement, executed the 1997 will. We recognize that the complaint seeks certification and transfer to the circuit court as a will contest; however, it also clearly claims that the testator breached his agreement with Ms. Cook. While the breach of contract claim is not properly a part of the will contest, it was asserted in the plaintiffs' complaint and we are satisfied that it should be construed as a claim against the estate.

While the "Complaint After Probate" was timely filed – being filed within three months of the testator's death – it totally failed to comply with the above-quoted provisions of Tenn. Code Ann. § 30-2-307(b). First, there is no credible evidence that the critical written documents underlying the claim – the copies of the 1992 will and related memoranda, all allegedly signed on the same date – were filed with the claim. The only credible evidence is that they first were brought to the trial court's attention some 15 months after the testator's death. Furthermore, it is clear that the claim filed on March 6, 1998, does not contain the oath mandated by the above-referenced statute. In fact, the requisite oath was never filed in this case at any stage in the proceedings.

Given the record before us, we hold that the defendants were entitled to summary judgment on their defense that the plaintiffs did not file a properly-supported claim with the requisite oath. While the "Complaint After Probate," construed most favorably to the plaintiffs, was timely filed, it was not in proper form and we believe the trial court reached the correct conclusion when it disallowed it by way of summary judgment.

V. *Presumption of Revocation*

As an alternative basis for rejecting the plaintiffs' claim, the trial court concluded that the plaintiffs had failed to overcome the presumption of revocation arising out of their failure to produce the original documentation, *i.e.*, the 1992 will and accompanying memoranda. In so holding, we believe the trial court erred.

When an original will is lost, the proponent of that will must demonstrate the following: (1) that the will was executed in accordance with the law; (2) the substance and contents of the will; and (3) that the will had not been revoked, and that it is lost, destroyed or cannot be found after a due and proper search. ***In re Estate of West***, 729 S.W.2d 676, 678 (Tenn. Ct. App. 1987) (citations omitted). Not one, but all three of these elements must be demonstrated by "the clearest and most stringent evidence" or "clear, cogent and convincing proof." ***Shrum v. Powell***, 604 S.W.2d 869, 871 (Tenn. Ct. App. 1980) (citation omitted). It is further incumbent upon the proponent of the lost will to overcome the presumption that failure to locate the will means that the testator destroyed the will. ***In re Estate of West***, 729 S.W.2d at 678 (citations omitted). Therefore, to overcome this presumption, one "must prove that the testator did not have custody and control of the will after

execution, or that he had lost his testamentary capacity for a period before his death and that the will was in existence at the time the loss of competency occurred." ***Id.*** (citation omitted).

The trial court found the following with respect to the application of the presumption of revocation to the facts before it:

> One who seeks to establish a lost or destroyed will assumes the burden of overcoming this presumption by adequate proof. It is not sufficient to show the persons interested in establishing intestacy have an opportunity to destroy the will. One must go further and show by facts and circumstances that the will was actually lost or destroyed fraudulently against and not in accordance with the wishes and intent of the testator.
>
> The Plaintiffs in response to this Court's direction to produce an original will filed an affidavit. No original will has ever been produced. No facts nor circumstances have been raised to prove that the will was destroyed against and not in accordance with the wishes and intentions of the testators. Therefore, as a matter of law, the presumption of revocation applies.

The affidavit from Elizabeth Williams, the attorney who notarized the 1992 will and the accompanying memoranda, supports a finding that the 1992 will was executed in accordance with law. The substance of the will is shown by the copy that was ultimately filed with the court. The affidavits of the Donnelly children arguably show that the 1992 joint will and the memoranda of irrevocablity were not revoked by the testator and Ms. Cook *prior to her death*. Certainly, the plaintiffs' filings, including the affidavits, make out a genuine issue of material fact on the issue of whether the joint will was irrevocable and whether that will was revoked by the testator and Ms. Cook prior to the latter's death. If the joint will was irrevocable and if it was not revoked by the two of them prior to Ms. Cook's death, it is immaterial that the testator's 1997 will contains a provision revoking "all instruments of a testamentary nature heretofore made by [him]." If the joint will was irrevocable and was not properly revoked before Ms. Cook's death, the testator was without the power to revoke it thereafter. Accordingly, we reverse so much of the trial court's judgment as holds to the contrary. Summary judgment is not appropriate on this issue.

VI. *In Terrorem Clause*

Lastly, the defendants challenge the trial court's judgment that the *in terrorem* clause contained in the 1997 will is not implicated by the facts of this case. That clause provides as follows:

> In the event that any of the beneficiaries of this will, other than the Co-Executors and Executrix hereinbefore name [sic], should contest said will or bring any suit regarding my estate, such contestant by such action on his part shall forfeit all of the property that he or she

> would otherwise [sic] under this will, and the bequest or devised property to such beneficiary shall be revoked and pass instead under the residuary clause hereof.

The trial court found that there were facts before it reflecting that the plaintiffs acted "with somewhat reasonable justification" in contesting the 1997 will, and in pursuing their claim pertaining to the irrevocability of the 1992 will.

Forfeiture clauses of this nature have been upheld as consistent with public policy; however, in general terms, they are not enforceable if there is "probable cause" to contest a will and the contest is filed in good faith. ***Tate v. Camp***, 245 S.W. 839, 842 (Tenn. 1922). Given the proffered existence of the 1992 will and the allegations of undue influence and lack of testamentary capacity, we find that, based upon the record now before us, there is a general issue of material fact as to whether the plaintiffs had probable cause to contest the will and whether the contest is being pursued in good faith. Accordingly, we agree with the trial court that summary judgment is not appropriate on the issue of the *in terrorem* clause.[5]

VII. *Conclusion*

We affirm so much of the trial court's judgment as holds (1) that the plaintiffs failed to file a properly-supported claim, with the statutorily-mandated oath, for breach of contract not to revoke the earlier will; and (2) that there is a genuine issue of material fact regarding the enforcement of the *in terrorem* clause against the plaintiffs. In all other respects, we reverse the trial court's judgment. It results that the plaintiffs' claim for breach of contract not to revoke the 1992 will is hereby dismissed with costs on appeal and at the trial level taxed to Lisa Donnelly Gelfand and Sandra Donnelly Schweitzer. This case is remanded to the trial court for the collection of that court's costs, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE

[5] Each side has filed a motion to strike the other side's reply brief. We do not find it necessary to resolve either motion. Suffice it to say that we have only considered such portions of these two filings as we find to be properly before us.